Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ARTHUR CALDERON, Warden, *Petitioner*,

v.

HORACE EDWARDS KELLY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTIONS PRESENTED

1. Whether a final judgment dismissing a case for failure to comply with the one-year period of limitation for filing an application for a writ of habeas corpus, mandated by the Antiterrorism and Effective Death Penalty Act of 1996, is governed by res judicata principles.

2. Whether a request for counsel in a capital case in federal district court pursuant to 21 U.S.C. § 848(q)(4)(B) makes a case pending for the purpose of determining if it is subject to the requirements of the Antiterrorism and Effective Death Penalty Act of 1996.

3. Whether the inability to assist counsel is a valid justification for equitably tolling the one-year statutory limitation period of the Antiterrorism and Effective Death Penalty Act of 1996.

4. Whether the statutory limitation period of the AEDPA may be equitably tolled after its expiration.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No.

ARTHUR CALDERON, Warden, *Petitioner*,

v.

HORACE EDWARDS KELLY, *Respondent*.

Petitioner Arthur Calderon, Warden of the California State Prison at San Quentin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

People v. Horace Edwards Kelly, 51 Cal. 3d 931, 275 Cal. Rptr. 160, 800 P.2d 516 (1990), cert. denied 502 U.S. 842 (1991) (Kelly I), a published Opinion of the California State Supreme Court affirming Kelly's judgment of conviction and death sentence in his Riverside County case.

People v. Horace Edwards Kelly, 1 Cal. 4th 495 (1992), cert. denied 506 U.S. 881 (1992) (Kelly II) a published Opinion of the California State Supreme Court affirming Kelly's judgment of conviction and death sentence in his San Bernardino County case.

In re Horace Edwards Kelly (Cal. Supreme Case Nos. S026194, S017561, S069124 and S069125), unpublished orders of the California Supreme Court denying petitions for writ of habeas corpus by Kelly.

Horace Edwards Kelly v. Daniel Vasquez, (June 17, 1997), U. S. Dist.Ct. C.D. Cal. Nos. CV-92-5420-TJH

and 93-2951-TJH), unpublished order of the United States District Court for the Central District of California denying motion by Warden Calderon to dismiss and vacate the stays of execution and ordering that the AEDPA statute of limitations did not apply to Kelly's cases. A copy appears at Appendix 1.

Calderon v. U.S. District Court, 127 F.3d 782 (9th Cir. 1997) (Kelly III), Petition for Rehearing and Rehearing En Banc denied January 4, 1998, cert. denied __U.S.__, 118 S. Ct. 1396, a published Opinion by the United States Court of Appeals for the Ninth Circuit granting Petitioner Calderon's Petition for Writ of Mandate to the United States District Court for the Central District of California ordering the dismissal of proceedings in that court due to Kelly's failure to file a petition for writ of habeas corpus within the one-year limitation period. A copy appears at Appendix 2.

Horace Edwards Kelly v. Daniel Vasquez, (February 2, 1998, U.S. Dist. Ct. C.D. Cal. Nos. CV-92-5420-TJH and CV-93-2951-TJH), unpublished order of the United States District Court for the Central District of California dismissing the cases and vacating the stays of execution pursuant to the Ninth Circuit's mandate. A copy appears at Appendix 3.

Horace Edwards Kelly v. Arthur Calderon, (June 3, 1998, U.S. Dist.Ct. C.D. Cal. Nos. CV-98-2722-TJH and CV-98-2723-TJH), unpublished order of the United States District Court for the Central District of California granting equitable tolling and permitting Kelly to challenge his state court convictions by way of federal habeas corpus. A copy appears at Appendix 4.

Calderon v. U.S. District Court, Case No. 98-70569 Slip Op. (9th Cir. Jun. 9, 1998) (Kelly IV) a published Opinion by the United States Court of Appeals for the Ninth Circuit granting Warden Calderon's Petition for Writ of Mandate to the United States District Court for the Central District of California ordering the court to

dismiss habeas petitions filed by Kelly in contravention of the previously granted Writ of Mandate. The opinion was withdrawn upon the grant of en banc review. Calderon v. United States District Court, Case No. 98-70569, 1998 WL 351217 (9th Cir. Jun. 26, 1998). A copy appears at Appendix 5.

Calderon v. U.S. District Court, Case No. 98-70569 __ F.3d __ (9th Cir. 1998) (Kelly V) a published en banc opinion of the United States Court of Appeals for the Ninth Circuit filed on December 15, 1998, reconsidering the prior two opinions of the three-judge panel and denying the Petition for Writ of Mandate. A copy appears at Appendix 6.

STATEMENT OF JURISDICTION

The Opinion of the United States Court of Appeal for the Ninth Circuit was filed December 15, 1998. The jurisdiction of this Court is invoked under Title 28 of United States Code § 1254(1).

CONSTITUTIONS, STATUTES OR REGULATIONS

The following statutes and rules are relied on and referred to in this Petition and their pertinent text may be found in Appendix 7.

1. Section 101 of the Antiterrorism and Effective Death Penalty Act of 1996, appearing in Chapter 153 of Title 28 of United States Code § 2244.

2. Title 21 of the United States Code § 848(q)(4).

3. Rules of Civil Procedure, Rule 3, Commencement of Action.

STATEMENT OF THE CASE

On May 26, 1986, Horace Edwards Kelly was sentenced to death following his conviction for murdering 11-year-old Danny Osentowski in Riverside County California. On November 26, 1990, the California Supreme Court affirmed Kelly's conviction and death sentence following his automatic direct appeal. People v. Kelly, 51 Cal. 3d 931, 275 Cal. Rptr. 160, 800 P.2d 516 (1990). On October 7, 1991, this Court denied Kelly's Petition for Writ of Certiorari. Kelly v. California, 502 U.S. 842 (1991). On January 15, 1992, pursuant to 21 U.S.C. § 848(q)(4)(B), the United States District Court, Central District of California stayed Kelly's execution and appointed counsel to represent him. Case No. CV 92-5420-TJH. On January 5, 1996, a next friend, Kelly's mother, was appointed to represent Kelly's interest.

On February 25, 1988, Kelly was sentenced to death following his convictions for murdering two women while attempting to rape them in San Bernardino County California. On January 16, 1992, the California Supreme Court affirmed Kelly's convictions and death sentence following his automatic direct appeal. People v. Kelly, 1 Cal. 4th 495, 3 Cal. Rptr. 2d 677, 822 P.2d 385 (1992). On October 5, 1992, this Court denied Kelly's Petition for Writ of Certiorari. Kelly v. California, 506 U.S. 881 (1992). On June 4, 1993, pursuant to 21 U.S.C. § 848(q)(4)(B), the United States District Court, Central District of California stayed Kelly's execution and appointed counsel to represent him. Case No. CV 93-2951-TJH. On January 5, 1996, a next friend, Kelly's mother, was appointed to represent Kelly's interests.

On April 24, 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Among other changes the new legislation imposed a one-year time limit for the filing of federal habeas corpus petitions.

On May 2, 1997, because a Petition for Writ of Habeas Corpus had not been filed by Kelly within the one-year limitation period of the AEDPA, a motion to dismiss and vacate the stays of execution was filed. When the District Court denied the motion on the basis that the AEDPA did not apply to Kelly's proceedings, a Petition for Writ of Mandate was filed in the United States Court of Appeals for the Ninth Circuit. On September 9, 1997, the Ninth Circuit Court of Appeals issued its Opinion granting the Petition for Writ of Mandate and issued the Writ directing the United States District Court to dismiss the matters forthwith. Calderon v. U.S. District Court, 127 F.3d 782 (9th Cir. 1997) (Kelly III). On January 14, 1998, the Ninth Circuit Court of Appeals issued an order denying the Petition for Rehearing and Suggestion for Rehearing In Banc and again ordered the District Court to dismiss the proceedings and vacate the stays of execution. On February 6, 1997, the United States District Court complied with the Order of the Ninth Circuit Court of Appeals and dismissed the proceedings. On February 17, 1998, Kelly filed a Petition for Writ of Certiorari in this Court. On April 6, 1998, this Court denied the Petition for Writ of Certiorari. Kelly v. Calderon, ___ U.S. ___, 118 S. Ct. 395 (1998).

Based on the finality of the federal proceedings new execution dates were set. However, due to a finding by the Warden of San Quentin State Prison, pursuant to California Penal Code section 3701 that Kelly may have become insane for purposes of execution the matter was referred to the Marin County District Attorney's Office for a jury determination of sanity. That proceeding began on April 6, 1998.

On March 31, 1998, Kelly, through counsel who was representing him in the state sanity hearing filed two Petitions for Writ of Habeas Corpus in the California Supreme Court. These petitions were eventually denied on June 2, 1998, and June 26, 1998.

On April 6, 1998, the United States District Court, Central District permitted the filing of two Petitions for Writ of Habeas Corpus, under the same case numbers of the proceedings previously dismissed, which included, among other claims, those then pending in the California Supreme Court. Also filed were various motions, including one for equitably tolling, and a request to stay the execution dates. The pleadings were prepared by the federal public defender. The federal public defender was not appointed, retained or otherwise authorized to represent Kelly who was being represented by different counsel in the ongoing state court litigation. One petition challenged the Riverside convictions and the other the San Bernardino convictions.

At a hearing on April 10, 1998, the District Court noted that the petitions were improperly filed under the case numbers ordered dismissed by the Ninth Circuit in Kelly III and stated it had no jurisdiction. On April 13, 1998, the two habeas petitions were refiled in the District Court and given new numbers, CV 98-2722 and CV 98-2723. Warden Calderon filed a motion to dismiss on April 14, 1998. On April 15, 1998, the federal public defender was appointed to represent Kelly although he was still being represented by different counsel in the ongoing state court proceedings. Over Warden Calderon's objection, the federal public defender was also appointed as Kelly's next friend. Kelly's motion for a stay of execution was taken under submission as well as his motion for equitable tolling of the one-year statutory limitation period of the AEDPA. Warden Calderon's motion to dismiss the proceedings was also taken under submission.

On April 23, 1998, Warden Calderon filed a Petition for Writ of Mandamus in the Ninth Circuit requesting that the District Court be ordered to dismiss the petitions as being filed in violation of the writ issued in Kelly III. On May 6, 1998, the Petition was denied.

On May 15, 1998, a five week trial was concluded in Marin County and the jury reached a verdict that Kelly was sane for purposes of execution. On May 26, 1998, another Petition for Writ of Mandamus was filed by Warden Calderon in the Ninth Circuit asking again that the District Court be ordered to dismiss the habeas petitions.[1] While the Petition for Writ of Mandamus was pending, on June 3, 1998, the District Court granted Kelly's motion and ordered the one-year statutory limitation period for filing a habeas petition equitably tolled and stayed his execution. On June 9, 1998, the Ninth Circuit issued a second Writ of Mandamus directing the District Court to dismiss the habeas petitions with the exception of those claims challenging the sanity determination. A Petition for Rehearing and Suggestion for Rehearing En Banc was granted and the panel decision was ordered withdrawn. On December 15, 1998, the Opinion of the en banc panel was filed. It reconsidered both of its previous Opinions, denied the Petition for a Writ of Mandamus and ruled that res judicata did not preclude the en banc panel from reconsidering the final decision granting the initial Writ of Mandamus and that the AEDPA did not apply since Kelly's act of requesting counsel made his case pending prior to the effective date of the AEDPA. The en banc ruling also held that equitable tolling granted after the filing of the petition for writ of mandamus was proper and that inability to assist counsel would support equitable tolling of the AEDPA limitation period.

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1. The jurisdiction of the United States Court of Appeals for the Ninth Circuit was pursuant to the All Writs Act, 28 U.S.C. § 1651(a).

A. Reasons for Granting the Writ

Recently in Calderon v. Thompson, __ U.S. ___, 118 S. Ct. 1489 (1998), this Court stressed the importance of the State's reliance on the determination that a federal habeas proceeding is final. In the present case the en banc Ninth Circuit Court of Appeals ignored a final determination that Kelly had forfeited his right to federal habeas relief due to his failure to file a timely petition. This Court should exercise its supervisorial powers and correct this clearly erroneous decision.

Previously, every Circuit of the United States Court of Appeals, including the Ninth Circuit, has consistently held that the appointment of counsel pursuant to 21 U.S.C. § 848(q)(4)(B) did not make a case pending for the purpose of determining if the AEDPA rules would apply. By altering its view on this important question of law the Ninth Circuit has now created a conflict with the other circuits that can be resolved only by this Court.

In addition, the en banc Opinion has created a new rule of law that Kelly has a right to be able to assist counsel in his federal habeas proceedings and therefor his alleged mental incompetency should be a basis for equitably tolling the one-year statutory limitation period. This rule conflicts with Opinions of this Court which hold that habeas proceedings should proceed through a next friend. Certiorari should be granted to resolve the conflict in this important area of law.

The en banc opinion has also expanded the doctrine of equitable tolling to allow evolving bases to be advanced in its support. This holding effectively does away with the one-year statutory limitation period of the AEDPA. New factual bases for equitable tolling should not be considered after the expiration of the one-year limitation period of the AEDPA.

ARGUMENT

I.

A FINAL JUDGMENT DISMISSING A HABEAS PROCEEDING FOR FAILURE TO COMPLY WITH THE ONE YEAR STATUTORY LIMITATIONS PERIOD OF AEDPA IS GOVERNED BY RE JUDICATA PRINCIPLES

In Calderon v. United States District Court, 127 F.3d 782 (9th Cir. 1997) (Kelly III), a three-judge panel of the United States Court of Appeals for the Ninth Circuit ruled that the failure of Kelly to file a habeas petition within the one-year statutory limitations period of AEDPA precluded him from challenging his state court convictions by way of federal habeas corpus and that the proffered reasons for equitable tolling did not justify relief from the default.[2] A Petition for Rehearing and Suggestion For Rehearing En Banc was denied. A Petition for Writ of Certiorari was denied by this Court. In reliance on the finality of the federal challenges to the underlying convictions, a new execution date was set and an extensive five-week state court trial into Kelly's sanity for purposes of execution was held. In addition, the Governor of California conducted a clemency hearing in anticipation of the execution.

In Calderon v. Thompson, 118 S. Ct. at 1489, this Court held that the Court of Appeals abused its discretion in recalling the mandate and reconsidering a final judgment in a federal habeas corpus and stressed the

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2. In Kelly IV the panel acknowledged that additional claims could be presented if they met the requirements of 28 U.S.C § 2244(d)(1)(B) or (D). Slip Op. at 5.

importance of finality in habeas proceedings. Calderon v. Thompson, 118 S. Ct. at 1500-02. The action of the Court of Appeals in the present case is far more egregious than the manipulations in Thompson. Since it could not recall the mandate previously issued, the Court of Appeals held that it was not bound by the previous final judgement under the theory that res judicata does not apply to habeas corpus.[3] Slip Op. at 13524-25.

As the dissent to the en banc opinion correctly points out, the rule that res judicata does not apply to habeas corpus is not applicable since Kelly had not filed a habeas petition. Kelly V, Slip Op. at 13539. The res judicata effect sought by Warden Calderon was based on the Writ of Mandate granted by the Ninth Circuit, not a judgment in a habeas proceeding. There was a post-conviction proceeding pending that was dismissed pursuant to Kelly III, but it was not a habeas petition that was dismissed. It is correct that in the past res judicata has been held inapplicable to successive habeas petitions and that the propriety of filing additional petitions has been evaluated under an abuse of the writ analysis. McCleskey v. Zant, 499 U.S. 467, 479-83, 111 S. Ct. 1454 (1991). However, it was never claimed that Kelly abused the writ and thereby should be foreclosed from filing a subsequent petition. The argument was simply that he failed to meet a statutory limitation for filing a petition without justification and as a result he was foreclosed from

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3. This transparent attempt to avoid the final judgment and this Court's Opinion in Thompson should not be countenanced. The Ninth Circuit had no jurisdiction to reconsider the holding in Kelly III. The only issue pending before that court in Kelly IV and Kelly V was whether to order the district court to comply with the unequivocal ruling in Kelly III. The Petition for Writ of Mandamus filed by Warden Calderon was based primarily on this Court's strong message in Thompson to honor finality in habeas corpus proceedings. By failing to even acknowledge the Thompson opinion in the present case the Ninth Circuit has chosen to ignore its holding.

challenging his state court convictions. Even if the appointment of counsel in the District Court could be construed as some type of habeas proceeding this is not dispositive. As pointed out in Kelly V (Silverman conc., Slip Op. at 13536).

> By definition, a petition for writ of habeas corpus is a collateral attack on a final judgment. It is in that sense that res judicata does not apply to habeas corpus proceedings. That is a far cry from a rule of res judicata that prevents a habeas petitioner who has already litigated X in habeas proceedings from relitigating X in new habeas proceedings without good excuse.

In any event, the general rule that res judicata does not apply to habeas petitions has been abrogated by the AEDPA. Again, as noted in Kelly V (Slip Op. at 13534-35, Silverman conc.)

> When Congress amended S 2244 of the habeas corpus statute in 1966 (sic), it specifically stated that 'the purpose of these new subsections is to add to section 2244 of title 28, United States Code, provisions for a qualified application of the doctrine of res judicata.' S.Rep.No. 89-1797, at 2 (1966) (emphasis added). The Supreme Court has agreed. See Calderon v. Thompson, 118 S.Ct. 1489, 1500-1501 (1998). See also Schlup v. Delo, 513 U.S. 298, 318-19 (1995) (successive petition standard is a 'qualified application of res judicata'); Felker v. Turpin, 116 S.Ct. 2333, 2340 (1996) ('the new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice "abuse of the writ"'); McCleskey v. Zant, 499 U.S. 467, 486 (1991) ('subparagraph (b) [to 28 U.S.C. S 2244]

> established a qualified application of res judicata').

Slip. Op. 13534-35.

It is clear and uncontested that the issuance of the Writ of Mandamus by the Ninth Circuit in Calderon v. U.S. District Court, 127 F.3d 782 (Kelly III) was a final order entitled to res judicata effect. The Ninth Circuit Court of Appeals had the opportunity to reconsider that decision but declined to order a rehearing en banc. This Court denied certiorari. In reliance on the finality of the federal proceedings an extensive trial into Kelly's sanity for purposes of execution was held. The Governor of California instituted and completed clemency proceedings due to the pending execution. The Court of Appeals lacked jurisdiction to reconsider the Writ of Mandamus which decided that Kelly was precluded from challenging his state court convictions due to his failure to meet the statutory deadline for filing a petition. Certiorari should be granted to review the Opinion below.

II.

THE FILING OF A REQUEST FOR COUNSEL UNDER 21 U.S.C. § 848 DOES NOT MAKE A CASE PENDING FOR THE PURPOSE OF DETERMINING IF THE AEDPA APPLIES

In Lindh v. Murphy, 519 U.S. 1074, 117 S. Ct. 2059, 2061 (1997) this Court ruled that the AEDPA was not to be applied retroactivly and did not apply to those cases which were pending on the effective date of the statute. Prior to the issuance of the present Opinion, every circuit of the United States Court of Appeals that had considered the issue has held that a request for counsel under § 848(q)(4)(B) did not make a case pending and that the AEDPA would apply to any case where a petition had not been filed by the effective date of the statute. See Holman v. Gilmore, 126 F.3d 876 (7th Cir. 1997), cert. denied 118 S. Ct. 1169; Williams v. Cain, 125 F.3d 269 (5th Cir. 1997), cert. denied 118 S. Ct. 2338; Nobles v. Johnson, 127 F.3d 409 (5th Cir. 1997), cert. denied 118 S. Ct. 1845; Calderon v. US District Court (Beeler), 128 F. 3d 1283 (9th Cir. 1997) cert. denied 118 S. Ct. 1389; Calderon v. U.S. District Court (Kelly III), 127 F.3d 782, cert. denied 118 S. Ct. 1395.

In overruling those portions of Beeler and Kelly III which agreed with the other circuits on this issue, the en banc court relied on this Court's recent opinion in Hohn v. United States, ___ U.S. ___, 118 S. Ct. 1969 (1998). Slip Op. at 13527-29. Hohn does not suggest or require that result.

In Hohn, this Court held that it had jurisdiction to review on Petition for Writ of Certiorari, a denial of an application for a certificate of appealability under the AEDPA by the Court of Appeals since the application

qualified as a "case" permitting review by way of certiorari. Hohn v. United States, 118 S. Ct. at 1972-78. That holding has no relationship to the question decided by the Court of Appeals. It is not questioned that the request for counsel under 21 U.S.C. § 848(q)(4)(B) gave the District Court limited jurisdiction which permitted the issuance of a stay of execution and the appointment of counsel. See McFarland v. Scott, 512 U.S. 849, 854-59, 114 S. Ct. 2568, (1994). In that regard, a post-conviction proceeding was pending which was the vehicle for Petitioner Calderon to move to dismiss the matter for failure to comply with the one-year limitation period and to petition for writ of mandate to the Court of Appeals. That proceeding also provided jurisdiction for Kelly to petition for writ of certiorari to this Court challenging the granting of the writ of mandate. This is, however, a far cry from holding that a request for the appointment of counsel makes a case pending for the purpose of determining the application of the AEDPA. As the dissent in Kelly V points out "the words may appear the same but their meanings are vastly different." Slip Op. at 13539-40.

In Hohn, this Court used the word "case" to decide whether it had jurisdiction. In Beeler and the other Court of Appeals rulings the word "case" was used to interpret whether a statute of limitations had run. Both this Court (Hohn, 118 S. Ct. at 1975) and the en banc Court of Appeals, Slip Op. at 13528-29, relied on Ex Parte Quirin, 317 U.S. 1 (1942) to support the holding. While Quirin may support this Court's conclusion, it is inapposite to that of the Court of Appeals.

> While it is the usual procedure on an application for a writ of habeas corpus in the federal courts for the court to issue the writ and on the return to hear and dispose of the case, it may without issuing the writ consider and determine whether the facts alleged by the petition, if proved, would warrant discharge of

> the prisoner. *Walker* v. *Johnston*, 312 U.S. 275, 284. Presentation of the petition for judicial action is the institution of a suit. Hence denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari.

Ex Parte Quirin, 317 U.S. at 24, emphasis added.

Neither McFarland, Lindh nor Hohn was decided with the present problem in mind. Although decided prior to Hohn, both the Seventh and Fifth Circuit Courts of Appeals declined to torture the language of this Court's opinions to obtain the result reached by the Ninth Circuit. Holman v. Gilmore, 126 F.3d 876, 879-80; Williams v. Cain, 125 F.3d 269, 273-74.

Also, as a practical matter, it is clear that Congress did not intend the convoluted results reached by the en banc court. The AEDPA represents an extensively debated response to an abiding public outrage over endless delays in habeas corpus litigation. The purpose of the habeas reform found in the AEDPA was

> to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases.

U.S. Code Cong. & Admn. News, 104th Cong. 2nd Sess. at 944 (1996) (House Conf. Rpt. 104-518 at 111). The Ninth Circuit in Kelly III correctly ruled based on Congressional intent:

> Were there any doubt [that "cases pending" means the petition has been filed], it is dispelled by Congress's obvious intent to ""halt the unacceptable delay which has developed in the federal habeas process."" [citing Beeler, 128 F.3d at 1288-1289.] . . . The rule [that a request for

> appointment of counsel removes a case from the AEDPA's requirements] would seriously undercut Congress's purpose. . . . If a mere appointment of counsel in what amounts to a proceeding ancillary to a true habeas corpus application can avoid the one-year statute of limitations, the Act will not have been very effective at all.

Calderon v. United States District Court (Kelly III), 127 F.3d at 785. The above logic remains intact and was not obviated by the unrelated discussion of "cases" in Hohn.

The term "cases pending" or "filed" should not be defined by isolated terms in the Act or cases addressing different legal issues. To discern the intent of Congress, the focus should be on determining at what point in a case the law would impair the substantive rights of a party who acted in reliance upon the law, so as to avoid any retroactive effect on a case. Landgraf v. U.S.I. Film Products, 511 U.S. 244, 280 (1994); Lindenthal v. General Dynamics Corp., 61 F.3d 1402, 1407-08 (9th Cir. 1995), cert. denied, 517 U.S. 1104 (1996).

In requesting appointment of counsel, Kelly was not relying on the law as it existed prior to the Act in making his request for appointment of counsel. Kelly could not have made his request for appointment of counsel in any way which could have been affected by the subsequent enactment of the AEDPA. The Act attached no legal consequences to this event, completed before the enactment of the Act. Indeed, Kelly was on notice since the Ninth Circuit had already ruled in Beeler on April 17, 1997, (Amended October 29, 1997) that the filing of a request for counsel did not make a case pending in determining the applicability of the AEDPA.

Hence, a request for appointment of counsel would not cause a case to be pending for purposes of the Act in Kelly's case. If a request for appointment of counsel caused a "case" to be "pending" with respect to the

question of retroactivity, the cases of death-row inmates who requested appointment of counsel prior to April 24, 1996, would alone receive an advantage over the cases of non-indigent inmates who retained counsel or had no counsel and also of all inmates in noncapital cases. Congress could not have intended such unequal treatment. In those cases where counsel may be appointed, fortuity as to when and if a request for appointed counsel could be made, and not valid settled expectations, would determine whether the Act would apply. The Ninth Circuit noted in Beeler this potential anomaly:

> A prisoner who had not requested counsel before April 24, 1996, would certainly have to apply for a writ within the limitations period. We merely hold that those provisions apply equally to prisoners who had requested counsel but not applied for a writ as of April 24, 1996.

Calderon v. United States District Court (Beeler), 128 F.3d at 1287, n.3. This logic was not changed by the decision in Hohn.

Thus, the Ninth Circuit's new holding does not give "meaning to the statute as a practical matter." See McFarland v. Scott, 512 U.S. at 855. Neither logic nor this Court's opinion in Hohn supports the conclusion that because Kelly requested appointment of counsel prior to the effective date of the Act, his case must be deemed pending and not subject to the Act.

The most meaningful and plausible starting point of a habeas case for purposes of determining when a case is pending is upon the filing of the habeas petition. The Ninth Circuit and Seventh Circuit Courts of Appeals specifically noted the appropriateness of Federal Rules of Civil Procedure, rule 3, which codifies this as a starting point. Calderon v. United States District Court (Beeler), 128 F.3d at 1287, n.3; Holman v. Gilmore, 126 F.3d at 880. It is the point at which a capital case, for either an

indigent and non-indigent petitioner, and a noncapital case commences. Thus, it is the fair and objective starting point for all cases. It is also the point at which a defendant will act with conscious regard to the law, presenting a petition in accordance with the requirements established by the Act.

The Courts of Appeals of various Circuits have found that the naturally understood and logical meaning of "cases pending" is cases where the habeas petition has been filed.

> The obvious approach, of course, is that a habeas petition is 'pending' only after a petition for writ of habeas corpus itself is filed.

Williams v. Cain, 125 F.3d at 274.

> Nothing in the AEDPA defines the set of 'cases' to which the effective-date rules apply, but the most logical definition is the universe of cases otherwise covered by [Chapter 153 and Chapter 154]--which is to say, a collateral attack on a criminal judgment. Prisoners may file many other kinds of suits, . . . but it would not be a sensible reading of the effective-date . . . to say that every species of prisoner litigation is a "case pending" for its purpose. A motion under § 848(q)(4) for appointment of counsel . . . is not itself a collateral attack.

Holman v. Gilmore, 126 F.3d at 879.

The Court of Appeals in Holman found, moreover, that a motion under 21 U.S.C. § 848(q)(4)(B) was "outside the rationale of Lindh." Id. at 880.

The Ninth Circuit's interpretation of the term "cases pending" requires a strained and illogical reading of the Act and case law concerning the Act. In an attempt to evade the requirements of the AEDPA, the Ninth

Circuit must defy the naturally understood meaning of the term as used by Congress and the courts regarding the applicability of the AEDPA. Not only does such interpretation rely on irrelevant definitions and assumptions concerning the use of the term "cases pending," it also lacks a logical and meaningful basis. A case should not be deemed pending upon simply a request for an appointment of counsel where no legal consequence of the AEDPA has yet attached.[4]

It seems clear that the Ninth Circuit has contorted the AEDPA and abandoned its prior opinion solely to provide relief to this Petitioner.

The Ninth Circuit was initially correct in ruling that a case is not pending under the AEDPA for purposes of retroactivity if a habeas petition was not filed prior to the effective date of the Act. The Courts of Appeals in, Nobles, Williams, and Holman, reached the same correct conclusion, each citing and emphasizing valid bases for their decision. Consistently the courts have found that the McFarland holding is inapplicable, and that the obvious and logical meaning of "cases pending" is that a habeas petition, not merely a request for counsel, must have been filed prior to the enactment of the AEDPA. Although not controlling, it should also be noted that this Court denied certiorari in all of the above cases while Hohn was pending.

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4. Even assuming the Court in Kelly V was correct in ruling that the filing of a request for counsel made a case pending within the meaning of Lindh, Kelly should not be affected. Since the underlying case was dismissed pursuant to the order of the Ninth Circuit in Kelly III any new filing would come within the requirements of the AEDPA. The attempt in Kelly V to ignore this fact by saying Kelly III was a mistake (Slip Op. at 13532-33) is as egregious as trying to avoid this result by recalling the mandate on the basis of a judicial mistake. See Calderon v. Thompson, 118 S. Ct. at 1502.

Certiorari should be granted to resolve this important issue of law due to the conflict created by the Ninth Circuit.

III.

THE ALLEGED INABILITY OF A HABEAS PETITIONER TO ASSIST COUNSEL IS NOT A PROPER BASIS FOR EQUITABLY TOLLING THE STATUTORY LIMITATION PERIOD

In a gratuitous holding[5/] the court in Kelly V ruled that Kelly's alleged inability to assist counsel justifies equitable tolling, at least until a reasonable period of time has elapsed after the District Court makes a competency determination. Slip Op. at 13532. This holding is contrary to binding authority of this Court and paves the way for an open-ended stay of proceedings in a host of causes. Kelly has already delayed the federal habeas proceedings for almost seven years on the basis of his claim that his inability to assist counsel prevented his counsel from filing habeas petitions. To now suggest that he is entitled to an additional "reasonable period" of equitable tolling makes a mockery of the limitations period.

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5. There has never been a request for equitable tolling of the statutory limitation period for a finite period of time due to Kelly's alleged inability to assist counsel. A request was made in the District Court for an indefinite stay of the proceedings until Kelly was able to assist counsel. Interestingly, counsel appointed for Kelly consistently claimed over a period of five years that they were unable to file a petition due to his inability to communicate. Following the dismissal of the proceedings pursuant to the writ of mandamus in Kelly III, the federal public defender, who had no authority to represent Kelly, was able to file two habeas petitions totalling 1478 pages with 6171 pages of exhibits on the same day the decision in Kelly III became final. It was improper to even consider the issue of equitable tolling in Kelly V since it was not raised by the Petition for Writ of Mandamus before the court. It was necessary for the en banc court to reconsider the final decision in Kelly III to reach the issue.

Although this Court has never ruled on the availability of equitable tolling to avoid the statutory limitation period of the AEDPA, the Ninth Circuit has held it is available in extraordinary circumstances. Calderon v. U.S. Dist. Ct. (Beeler), 128 F.3d at 1288.

Unlike a defendant in a criminal trial, a habeas corpus petitioner has no right, whether by virtue of statute or constitutional interpretation, to be competent to assist his post-conviction counsel. Thus, even if Kelly has become incompetent after he was previously found to be competent to stand trial (and to be executed), the post-conviction proceedings need not be stayed or otherwise interrupted.

A. There Is No Constitutional Right To Be Competent During The Pendency Of Post-Conviction Proceedings

The Due Process Clause of the Fourteenth Amendment prohibits the trial of a defendant who is not competent to consult with his attorney and understand the proceedings against him. Drope v. Missouri, 420 U.S. 162, 172 (1975); Pate v. Robinson, 383 U.S. 375, 378 (1966). No case has been discovered that has expanded this constitutional right to be competent to stand trial into a right to be competent after a final judgment has been obtained and during the pendency of post-conviction collateral challenges. In fact, the cases outlining Petitioners' rights in raising collateral challenges dictate that the right to be competent should not be extended to such post-trial proceedings.

The right to be competent at trial is a fundamental element of an adversary system of justice. Drope v. Missouri, 420 U.S. at 172. As noted by Blackstone, an incompetent person is neither able to enter a plea with advice and caution, nor make his defense if

the matter proceeds to trial. Drope v. Missouri, 420 U.S. at 171 (quoting 4 W. Blackstone Commentaries, *24). More contemporary commentators have alternatively ascribed the basis of the right as being a by-product of the ban against trials in absentia. Id. (citing Foote, A Comment on Pre-trial Commitment of Criminal Defendants, 108 U. PA. L. REV. 832, 834 (1960)).

The differences between trial and a post-conviction challenge to a final judgment militate against transforming the right to competency at trial into the right to be competent during the pendency of a habeas corpus petition. Unlike a defendant who becomes incompetent prior to trial, a habeas corpus petitioner has already pleaded not guilty, made a defense, consulted with counsel, and been present during trial. Moreover, after a final judgment has been reached and affirmed by the state courts, the very nature of the proceedings in the context of a federal habeas corpus petition changes from that of a criminal trial. A habeas corpus proceeding is not part of the criminal process, and is in fact civil in nature. Pennsylvania v. Finley, 481 U.S. 551, 557 (1987). The accused is no longer presumed innocent, and instead a presumption of correctness attaches to the state court judgment. Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

As a result of such differences between a criminal trial and a collateral attack on a judgment, courts have declined to extend to habeas corpus petitioners the same fundamental rights that are guaranteed to criminal defendants. Thus, for instance, this Court has held that there is no constitutional right to counsel in state post-conviction or federal habeas corpus proceedings. Coleman v. Thompson, 501 U.S. 722, 756-57, 111 S. Ct. 2546, 2566 (1991); McCleskey v. Zant, 499 U.S. at 495, 111 S. Ct. at 1471; Pennsylvania v. Finley, 481 U.S. at 555. Further, because there is no right to counsel, a petitioner cannot claim that his post-conviction counsel was ineffective. Coleman v. Thompson, 111 S. Ct. at 2566.

In concluding that a petitioner seeking post-conviction relief has no right to effective assistance of counsel, this Court has noted that even a pro se petitioner is able to obtain meaningful access to the courts in post-conviction proceedings by virtue of the trial record, appellate briefs, and opinions that already exist. Pennsylvania v. Finley, 481 U.S. at 557. Significantly, the court reached this conclusion even though a writ for post-conviction relief may entail developing a factual record that had not been previously presented to a court.

The reasoning of these decisions dictates the result in the present case. If Kelly cannot claim a constitutional right to effective assistance of counsel, then he cannot claim that his inability to communicate with his counsel as a result of his alleged incompetency somehow violates a right to fundamental fairness.

Because there is a final judgment in place, preventing a habeas corpus petitioner from proceeding based upon a finding of incompetence would infringe not only upon the State's interests, but also upon the petitioner's interests as well. As the California Supreme Court concluded in In re Kemp, 1 Cal. 3d 190, 192, n.1, 81 Cal. Rptr. 609, 460 P.2d 481 (1969), the determination of a petitioner's sanity has "no effect" upon habeas corpus proceedings because

> Even if found to be insane . . . [the petitioner] should be able to test the validity of his conviction and not be forced to remain in a mental institution under a threat of a judgment imposing the death penalty.

Although the right to be competent to stand trial has existed since the early common law, apparently no court has extended this right to petitioners seeking post-conviction relief. In fact, both this Court and the Ninth Circuit have tacitly concluded that there is no right to be competent while seeking post-conviction relief. In

Whitmore v. Arkansas, 495 U.S. 149, 163 (1990), the Court held that in order to have standing to pursue a habeas corpus petition as a next friend, the next friend must first show, inter alia, that the real party in interest is "unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." The Court did not conclude that collateral relief must be held in abeyance until the petitioner regains his competency.[6] In fact, such a conclusion would have been inconsistent with the requirements for standing to act as a next friend.

Previously the Ninth Circuit has also implicitly concluded that there is no constitutional right to be competent during habeas corpus proceedings. In Calderon v. Wade, 29 F.3d 1312, 1326, n.11 (9th Cir. 1994), cert. denied, 513 U.S. 1120 (1995), the court found no abuse of discretion when the District Court denied habeas counsel's request to determine whether the petitioner was competent to assist counsel. In so ruling, the court remarked that it failed to understand the need for such a finding of incompetence, noting that the petitioner was not attempting to waive any rights to proceed by habeas corpus. Id. Cf. Rees v. Peyton, 384 U.S. 312, 313-14, 86 S. Ct. 1505, 1506-07 (1966). The court further observed that the statutory right to be competent applies only during a criminal trial. Calderon v. Wade, 29 F.3d at 1326, n.11. See also In re Cockrum, 867 F. Supp. 484, 494 (E.D. Tex. 1994) (court found habeas petitioner incompetent to waive petition, and

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6. Indeed, Justice Brennen's dissent in Whitmore explicitly recognized that in the event a defendant becomes incompetent, a court would be required to appoint someone to represent him. Whitmore v. Arkansas, 495 U.S. 177, n.4 (citing Franz v. Lockhart, 700 F. Supp. 1005, 1011, n.2 (E.D. Ark. 1988). Kelly was represented by a next friend, his mother, prior to the dismissal of proceedings in federal court.

therefore concluded that substantive issues should be resolved).

Because of the significant difference between a criminal trial and post-conviction review of a final judgment, there is no basis for extending the right to be competent to a petitioner seeking habeas corpus relief. Thus, the present proceedings should continue without further delay regardless of whether Kelly is or is not incompetent.

B. There Is No Statutory Right To Be Competent During Post-Conviction Proceedings

There is neither a federal nor state statutory right to be competent in any proceeding after sentence has been imposed. The respective federal and state rights to be competent at trial are codified at 18 U.S.C. § 4241 and California Penal Code §§ 1367 and 1368. Significantly, each of these provisions emphasizes that such a right is not extended after a judgment has been entered. See 18 U.S.C. § 4241; Cal. Penal Code § 1368; People v. Kelly, 1 Cal. 4th at 544. Neither of these provisions could be said to extend the right to be competent to post-conviction proceedings. Calderon v. Wade, 29 F.3d at 1326, n.11; People v. Kelly, 1 Cal. 4th at 544. Accordingly, there is no legislative basis for staying or otherwise delaying the present proceedings.

The decision of the Court of Appeals below is inconsistent with prior holdings of this Court dealing with the ability to assist counsel on habeas corpus. Certiorari should be granted to consider this important question of law.

IV.

THE GRANTING OF EQUITABLE TOLLING ON A THEORY NOT INITIALLY ADVANCED AND NOT PRESENTED UNTIL AFTER THE STATUTE OF LIMITATIONS HAD EXPIRED WAS A GROSS ABUSE OF DISCRETION

As noted earlier, although this Court has not ruled on the applicability of equitable tolling to the AEDPA, the Ninth Circuit has previously held that it would not be available in most cases but only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time. Calderon v. US Dist. Ct (Beeler), 128 F.3d at 1288-89. While terming this a "high hurdle," id., the present case demonstrates that in reality any excuse will suffice. In fact, the present opinion suggests that equitable tolling will now be almost routine in death penalty cases, so much so that the remedy of mandamus will not be available to challenge it. Slip Op. 13518-19. The opinion would appear to invite district courts to delay as much as they choose knowing that the Ninth Circuit will not intervene.

As the record below shows, prior to the expiration of the one-year statutory limitation period on April 23, 1997, counsel for Kelly presented only one suggested justification, that due to his inability to communicate the statute should be tolled indefinitely. The District Court did not rule on this request but simply held that the AEDPA was inapplicable to Kelly. Pursuant to Warden Caldron's Petition for Writ of Mandate the Ninth Circuit, in Kelly III, ordered the proceedings dismissed for failing to meet the statutory deadline or present any satisfactory justification for failing to do so. At no time in the District Court, during the briefing in

Kelly III or oral argument did counsel for Kelly claim they had not filed a timely petition due to their belief that a prior order of the District Court precluded them from doing so. The issue first arose when the dissent in Kelly III suggested that such an interpretation of the order could be made. However, that purported justification was rejected when presented by way of a Petition for Rehearing and Suggestion for Rehearing En Banc.

After the proceedings were dismissed, execution dates were set, a sanity hearing conducted, a clemency hearing held and subsequent habeas petitions denied by the California Supreme Court, the District Court allowed new petitions to be filed and on June 3, 1998, granted equitable tolling on the basis of a claim that a prior order of the District Court was a proper basis for equitably tolling the statutory limitations period.[7] As pointed out in Kelly III, Silverman conc. (Slip Op. at 13536-67) Kelly should be barred from presenting belated reasons for equitable tolling, at least in the absence of a showing of cause and prejudice or manifest injustice.

Certiorari should be granted to consider the question of whether equitable tolling may be granted after the expiration of the statutory limitation period and if so, on what basis.

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7. The opinion below fails to explain how an order by the District Court on June 9, 1995, well prior to the effective date of the AEDPA of April 24, 1996, could have the effect of absolving Kelly from compliance from the statute.

CONCLUSION

Accordingly, this Court should issue a writ of certiorari and hold that: 1) a final judgment dismissing a case for failing to comply with the one-year statutory limitations period of the AEDPA is subject to res judicata; 2) the appointment of counsel pursuant to 21 U.S.C. § 848 does not make a case pending within the meaning of Lindh for purposes of determining the application of the AEDPA, 3) the inability to assist counsel is not a valid justification for failing to meet the statutory deadline of the AEDPA and 4) after the expiration of the statutory limitations period of the AEDPA equitable tolling may not be granted.

Dated: December 30, 1998.

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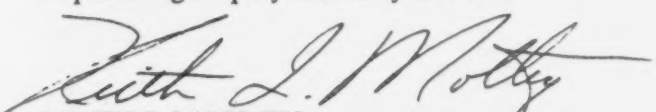

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